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May 27, 2004

VIA FEDERAL EXPRESS & E-MAIL

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: Petition for an Expedited Order that Verizon Remains Required to Provision Unbundled Network Elements on Existing Rates and Terms Pending the Effective Date of Amendments to the Parties' Interconnection Agreements

Dear Ms. Cottrell:

ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; McGraw Communications, Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc.; SegTEL, Inc.; and XO Massachusetts, Inc., by their attorneys, hereby submit for filing a Petition for an Expedited Order that Verizon Remains Required to Provision Unbundled Network Elements on Existing Rates and Terms Pending the Effective Date of Amendments to the Parties' Interconnection Agreements.

An original and four (4) copies of this filing are attached as well as a diskette containing an electronic version of the documents. Please date-stamp the enclosed extra copy of this filing and return it in the attached self-addressed, postage prepaid envelope provided. Please date-stamp the enclosed extra copy of this filing and return it in the attached self-addressed, postage prepaid envelope provided. Should you have any questions concerning this filing, please do not hesitate to contact me.

Respectfully submitted,

Paul B. Hudson

Enclosures

cc: Bruce P. Beausejour, Esq., Verizon Massachusetts
Michael Isenberg, Director, Telecommunications Division
Andrew O Kaplan, General Counsel, Telecommunications Division

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

PETITION FOR AN EXPEDITED ORDER THAT VERIZON REMAINS REQUIRED TO PROVISION UNBUNDLED NETWORK ELEMENTS ON EXISTING RATES AND TERMS PENDING THE EFFECTIVE DATE OF AMENDMENTS TO THE PARTIES' INTERCONNECTION AGREEMENTS	)	**DTE NO.**

PETITION FOR EXPEDITED RELIEF

ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; McGraw Communications, Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc.; segTEL, Inc.; and XO Massachusetts, Inc. (collectively "Petitioners") hereby petition the Department for an order clarifying that, if the D.C. Circuit's decision in *USTA II*[1] becomes effective on or after June 15, 2004, Verizon New England, Inc. ("Verizon") would remain obligated to provide unbundled loops, transport, and switching network elements on existing rates and terms unless and until amendments to Verizon's interconnection agreements and its Massachusetts UNE tariffs that alter such obligation are approved by the Department.

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[1] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). As the Department is aware, the D.C. Circuit's March 2, 2004 decision would vacate and remand the FCC's unbundling rules for transport and local switching. The Court has twice stayed its mandate, most recently through June 15, 2004. On May 24, 2004, the FCC and CLECs filed motions with the Court for an extension of this stay pending the filing of petitions for *certiorari* with the United States Supreme Court.

At this time, the *USTA II* stay is currently scheduled to be lifted on June 15. If the Department elects not to issue a decision before that date, it should provide interim clarification that Verizon may not alter its provision of UNEs pending the Department's consideration of this Petition.

This Petition should not have been necessary, because Verizon remains obligated to provide UNEs under the its interconnection agreements, Section 251 of the Act, and *Bell Atlantic-GTE Merger Conditions* even if the FCC implementing rules are vacated. However, Verizon has refused requests to confirm that it will not – unilaterally and unlawfully – alter or discontinue its provision of high-capacity loops,[2] transport and switching if *USTA II* becomes effective. Unilateral changes to the rates, terms and procedures for UNE access would, at a minimum, delay or even prevent CLECs from being able to execute service requests from existing and new customers.

As demonstrated below, CLECs have substantial arguments that Verizon will remain obligated by law to provide these UNEs even if the FCC rules are vacated. The debate over the legal impact of the Court's decision should be determined by regulators, not Verizon's fiat. Therefore, the requested order is urgently needed to preserve the *status quo* and to protect Massachusetts consumers and competitors from the threat of arbitrary and premature imposition of service and market disruption by Verizon.

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[2] Although the D.C. Circuit's opinion would only vacate the FCC's rules for unbundled local switching and dedicated transport network elements, Verizon has suggested, erroneously, that *USTA II* would also vacate the rules for high-capacity loops. The Petitioners emphatically reject this mischaracterization, but includes loops within the scope of this Petition to preclude any doubt as to Verizon's ongoing obligation to provide unbundled loops even if *USTA II* becomes effective. *See USTA II* at 594 (vacating only transport and switching rules).

I. THE *USTA II* ORDER, EVEN IF IT BECOMES EFFECTIVE, WOULD NOT IMMEDIATELY ALTER VERIZON'S STATUTORY, CONTRACTUAL AND TARIFF OBLIGATIONS

The D.C. Circuit's decision in *USTA II* to vacate the FCC's transport and switching unbundling rules represents only the latest, and certainly not the last, chapter in the ongoing attempt to implement the Telecommunications Act of 1996. Even if that decision becomes effective, it will not have any immediate effect on Verizon's statutory, contractual and state tariff obligations to provide unbundled network elements.

USTA II does not declare unlawful any UNEs or establish any limitations that would preclude the FCC from adopting new rules that restore all of the vacated transport and switching UNEs. Despite Verizon's request for a Court order that would have allowed it to stop provisioning UNEs if the FCC rules were vacated and not replaced with new unbundling rules,[3] the Court declined to grant such relief.[4] *USTA II* would merely remand the case to the FCC to make new unbundling determinations for transport and switching, which could be as extensive as those that were vacated.[5] In the interim, any attempt to "implement" the temporary absence of FCC unbundling rules would therefore result in unnecessary market disruption and would waste the resources of carriers and the Department.

Moreover, Verizon remains legally required under its existing interconnection agreements and Department tariffs to provide UNEs during the interim period before new rules are

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[3] *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Verizon's Petition For Writ of Mandamus To Enforce the Mandate of This Court (August 28, 2003), at 30.

[4] At oral argument, Judge Williams responded that "we don't have the authority to do that, only the FCC can do that." *USTA II,* Transcript of Oral Argument, January 28, 2004, at 7-11.

[5] On remand, the FCC and states through Section 252 proceedings, will remain obligated by Congressional mandate to ensure UNE access where CLECs would suffer impairment without such access. As demonstrated in Exhibit 1, it is beyond dispute that CLECs are impaired in at least some cases without access to transport, loops and switching. Therefore, any new lawful UNE rules would include many, if not all, of the UNEs that were covered by the vacated rules.

established. It is undisputed that, as of today, these contracts and tariffs require Verizon to provide unbundled transport, loops and switching at TELRIC rates. In the past, Verizon has recognized that pursuant to Section 252, any changes to its interconnection agreements warranted by an alleged change of law can only be implemented through bilateral amendments to the parties' interconnection agreements, which are negotiated or if necessary arbitrated. Verizon's Massachusetts UNE tariffs, meanwhile, can only be amended with Department approval.

The *TRO* reaffirmed that the contract amendment process – and not unilateral action – must be used to implement its provisions. The FCC found that "to the extent our decision in this Order changes carriers' obligations under section 251, we decline the request of several BOCs [including Verizon] that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions."[6] The FCC concluded that the contract amendment process "is the very essence of section 251 and section 252" of the Act, and is necessary to ensure that parties may fairly have the opportunity to "resolve disputes over any new agreement language arising from differing interpretations of our rules."[7] Because Verizon has a very different opinion than the Petitioners of the impact of *USTA II*, a deliberative amendment process subject to regulatory oversight is necessary to assure that the Congressional purpose of the 1996 Act is effectuated and the public interest is protected.[8]

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[6] *Triennial Review Order* at ¶ 701.

[7] *Triennial Review Order* at ¶¶ 700-701.

[8] If parties were permitted to execute unilateral changes to their interconnection agreements based upon their own opinions of the meaning of a new event, the Petitioners would be pleased to present Verizon with a list of changes that they would like unilaterally to make in the parties' agreements, based on their interpretations of the *TRO*. Verizon has no more right unilaterally to change its contracts than do CLECs.

As recently as the oral argument of *USTA II* before the D.C. Circuit, Verizon explicitly recognized its obligation to provide existing UNEs until new rules were implemented through contract amendments. Judge Edwards asked Verizon's counsel, Mr. Kellogg, what remedy the court could provide if it agreed to vacate the FCC's rules:

> Mr. Kellogg [counsel for Verizon]: The remedy is to remand to the FCC ... and to direct the Commission to do what Congress and the courts told them to do, which is to make an impairment determination.
>
> Judge Edwards: Where does that leave your clients, in your view, with respect to the precise matters that are at issue? ... [D]o they remain in limbo? That is, do they remain as they are now? Do you assume impairment, no impairment, what? What are you imagining?
>
> Mr. Kellogg: Well, it's a difficult question, Your Honor, because --
>
> Judge Edwards: That's why I'm raising it.
>
> Mr. Kellogg: -- we are subject, we are subject to a number of agreements in the states, and the states will continue to require us to provide elements pursuant to those agreements.
>
> Judge Edwards: Right.[9]

Thus, Verizon conceded to the Court that it must continue to provision UNEs under its existing interconnection agreements until the FCC issues new rules based on new impairment or non-impairment findings – just as it had done after the *Local Competition* and *UNE Remand Orders* were vacated.[10]

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[9] *USTA II,* Transcript of Oral Argument, January 28, 2004, at 7-11 (emphasis added).

[10] *See Common Carrier Bureau Establishes Rapid-Response System to Minimize Disputes Arising From Supreme Court's Iowa Utilities Board Order, Public Notice*, 14 FCC Rcd 4061 (1999) (*citing* letters from Bell companies and GTE stating the carriers' willingness to maintain the status quo regarding unbundled access following the Supreme Court's vacatur of the unbundling rules). Similarly, after *USTA I* vacated the *UNE Remand Order*, Verizon and the other Bell companies supported a stay of the mandate through February 20, 2003 (9 months after the issuance of the decision) to provide the FCC with sufficient time to adopt replacement rules in the Triennial Review proceeding. *See USTA I*, Nos. 00-1012, 00-1015, Motion for Stay, (D.C. Cir. Dec. 23, 2002).

June 15th would be, at most, a date like October 2, 2003, which was the day the *TRO* became effective. On that day, the ILECs did not make immediate changes to their UNE provisioning practices. Instead, they delivered letters to CLECs requesting the initiation of negotiations of contract amendments. If Verizon wishes to send such letters if *USTA II* becomes effective on June 15, it has the right to do so.[11] However, nothing more should occur on that date, and Verizon would remain obligated to continue to provision UNEs pending the execution of any contract amendment.

II. STATE ACTION IS NEEDED TO PROTECT CONSUMERS AND COMPETITION FROM VERIZON'S THREAT TO DISRUPT ITS PROVISION OF UNES UNILATERALLY AND PREMATURELY.

Sometime after its appearance before the D.C. Circuit, Verizon changed its mind about its willingness to comply with its interconnection agreements if the FCC rules were vacated. In a Complaint filed in the Eastern District of Virginia on April 5, 2004, Verizon contended that once the *USTA II* decision is final and effective, Verizon would "no longer be required to provide Cavalier with high-capacity facilities."[12] Similarly, Verizon wrote to the New York PSC on April 23, 2004, that "once the *USTA II* stay [sic] takes effect, Verizon will have no legal obligation to continue offering mass-market circuit switching or dedicated transport at TELRIC rates."[13] In the May 18, 2004 open meeting of the Delaware PSC, Verizon's counsel failed to provide a responsive answer to a Commissioner's question about Verizon's intentions after June 15, 2004. In

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[11] The Petitioners do not concede that a change of law would occur upon the issuance of the mandate in *USTA II*, for the reasons set forth in Exhibit 1. However, if Verizon disagrees, it could properly use the Section 252 process to seek a binding determination as to whether the contracts must be modified.

[12] *Verizon Virginia Inc. v. Cavalier Telephone LLC and the State Corporation Commission of Virginia*, Civil Action No. 3:04CV230, Complaint (E.D.Va. April 5, 2004) at 2.

[13] *Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271*, Case No. 04-C-0420, Reply Comments of Verizon (April 23, 2004) at 3.

addition, Verizon has announced its intention to implement by June 20, 2004, various Operating Support Systems ("OSS") changes that appear to be designed to facilitate the rejection of UNE orders and the introduction of additional charges for facilities that are now UNEs. While Petitioners do not contest these OSS changes in this Petition, Verizon's plans have escalated concerns that it intends to make unilateral changes to its unbundling obligations rather soon after June 15.

Disturbed by Verizon's equivocations, individual Petitioners sought assurance that Verizon would comply with its legal obligations in Massachusetts, as it had after the *Local Competition* and *UNE Remand Orders* were vacated. Verizon has to date refused to provide such assurance.

With June 15 quickly approaching, state commissions have started to respond to assure stability for competitors and consumers. The Rhode Island PUC committed to "maintain the status quo in Rhode Island regarding UNEs," and ruled that Verizon "is required to continue to provision Rhode Island's existing UNEs currently priced at existing TELRIC rates until it receives permission to terminate this obligation for a specific network element from this Commission."[14] Last week, the state commissions in Connecticut[15] and Washington[16] ordered similar relief. Meanwhile, other states are poised to act. In New York, Chairman Flynn declared that the

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[14] *In re Implementation of the FCC's Triennial Review Order and Review of Verizon Rhode Island's TELRIC Filings*, Docket Nos. 3550 and 2681, Order No. 17990 (Rhode Island Public Utilities Commission, March 26, 2004) at 7-8.

[15] *DPUC Investigation Into The Southern New England Telephone Company Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund in Light of the Telecommunications Act of 1996 – Reopener*, Docket No. 96-09-22, et al., Draft Decision (Connecticut Department of Public Utility Control, May 20, 2004).

[16] *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc.*, Docket No. UT-043013, Order No. 4 (Wash. Util. and Transp. Comm., May 21, 2004).

Commission would act to "to preserve the stability of New York's telecommunications market until there is greater legal certainty,"[17] while on May 14th New Jersey BPU Commissioner Hughes issued an order requesting public comments and explained that, "It is important for this Board to ensure that telecommunications services to CLEC customers are not unduly disrupted if and when the D.C. Circuit's mandate becomes effective."[18]

The Department must similarly act expeditiously if it is to protect the interests of its citizens. Verizon cannot lawfully alter its terms and rates for provisioning UNEs without amending its interconnection agreements and state UNE tariffs through the lawful process. If its proposed changes were disputed, the Department would be required to determine whether Verizon must continue to offer UNEs at TELRIC under the *Bell Atlantic/GTE Merger Conditions*, Section 251 of the Act, and state law. As the Petitioners demonstrate below, the answer to that question would be yes. But the Department need not answer this question now; it only need preserve the *status quo* until the regulatory process runs its normal course to resolve these issues in a manner that provides stability, protects consumers, and affords due process to all parties. The Department therefore can and should grant this Petition by requiring Verizon to continue to provide unbundled loops, transport and switching on existing rates and terms until interconnection agreement amendments that alter such obligation are approved pursuant to Section 252.

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[17] *Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271*, Case No. 04-C-0420, Public Notice at 1 (N.Y. Public Serv. Comm., March 29, 2004).

[18] *Implementation of the Federal Communications Commission's Triennial Review Order*, Docket No. TO-03090705, Request for Comments (N.J. Board of Public Utilities, May 14, 2004).

III. APPLICABLE LAW REQUIRES CONTINUED UNBUNDLING OF TRANSPORT, LOOPS AND SWITCHING.

As noted above, the Department need not determine the ultimate impact of *USTA II* because such a determination, prior to the negotiation process, would be premature. At this time, the Department need only order a preservation of the *status quo* that would last long enough for the lawful process for amending the parties' contracts to run its course. For illustrative purposes, Petitioners have attached hereto as Exhibit 1 its position statement that under applicable law Verizon would still be obligated to provide UNEs under the *Bell Atlantic/GTE Merger Conditions* and Section 251. While the Department need not rule on these issues at this time, the Petitioners' attached statement demonstrates at a minimum that there are substantial questions that must be addressed before regulators could authorize Verizon to discontinue or alter its provision of loops, transport or switching. It is vitally important that these issues be addressed by regulators through the contract amendment process, and not by Verizon unilaterally.

IV. THE REQUESTED RELIEF IS NOT PREEMPTED.

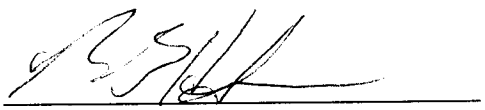
In other proceedings, Verizon has argued that a state order requiring continued unbundling pending the adoption of new rules would be preempted by force of the federal policy allegedly set forth in *USTA II*. However, neither the *TRO* nor *USTA II* has preempted the Department from remedying any alleged void left by *USTA II*. *USTA II* found that preemption would only be adjudicated if and when a party sought to invalidate a state unbundling rule on the basis that it conflicted with the regulations and policy set forth in the *TRO*. *USTA II*, 359 F.3d 554, 594 (D.C. Cir. 2004) ("deferring judicial review of the preemption issues until the FCC actually issues a ruling that a specific state unbundling requirement is preempted"). Thus, it is clear that preemption has not occurred based upon *USTA II* itself. The *TRO*, meanwhile, may have predicted that state unbundling orders that exceeded the unbundling list set forth in the

TRO might be preempted. However, the Petitioners are seeking to preserve transport, loop and switching UNEs that the *TRO* affirmed. It would be absurd for Verizon to suggest that the *TRO* itself preempts states from seeking to restore terms of the *TRO* that were temporarily vacated on procedural grounds. Therefore, the Department has clearly not been preempted from providing the requested relief as a means of protecting consumers and competition.[19]

V. CONCLUSION

Grant of this Petition on an expedited basis prior to June 15 is warranted to provide certainty to the market and consumers that service will not be unilaterally and unlawfully disrupted in the event that *USTA II* takes effect. The Department should therefore clarify that Verizon would remain obligated to provide unbundled loops, transport, and switching network elements on existing rates and terms unless and until amendments to Verizon's interconnection agreements and Massachusetts UNE tariffs that alter such obligation are approved by the Department.

Respectfully submitted,



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May 27, 2004

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[19] *See also* Section 601(c) of the 1996 Act, which provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."1996 Act, § 601(c), 110 Stat. at 143 (uncodified note to 47 U.S.C. § 152) (emphasis added).

EXHIBIT 1

PETITIONERS' STATEMENT REGARDING THE LEGAL OBLIGATIONS OF VERIZON IF AND WHEN ANY FCC UNBUNDLING RULES ARE VACATED

I. VERIZON REMAINS OBLIGATED TO PROVIDE UNEs AT TELRIC UNDER THE *BELL ATLANTIC/GTE MERGER CONDITIONS.*

Notwithstanding the *Triennial Review Order* ("*TRO*")[1] or *USTA II*, Verizon has an independent legal obligation pursuant to the *Bell Atlantic/GTE Merger Conditions* to continue to make UNEs available under the *UNE Remand* and *Line Sharing Orders* until the date on which the Commission orders in those proceedings, *and any subsequent proceedings*, become final and non-appealable.[2] The purpose of this condition was to provide stability to competitive markets during periods of uncertainty when the FCC's regulations implementing Section 251(c)(3) of the Act had been stayed or vacated.[3] The FCC explained:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, *from now until the date on which the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable,* Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. This condition

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[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Further Notice of Proposed Rulemaking, FCC 03-36 (Aug. 21, 2003) ("*Triennial Review Order*" or "*TRO*").

[2] *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control*, CC Docket 98-184, Memorandum Opinion and Order, FCC 00-221, Appendix D ¶ 39 (2000) ("Bell Atlantic/GTE Merger Order") ("Bell Atlantic/GTE shall continue to make available to telecommunications carriers, in the Bell Atlantic/GTE Service Area within each of the Bell Atlantic/GTE States, the UNEs and UNE combinations required in [the UNE Remand and Line Sharing Orders] ... in accordance with those Orders until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area.")

[3] *See id.* at ¶ 316 (emphasizing the intent to provide certainty to CLECs to counter uncertainty posed by litigation over ILEC unbundling obligations).

> only would have practical effect in the event that our rules adopted in the UNE Remand and Line Sharing proceedings are stayed or vacated.[4]

This condition remains in effect, because the successor proceeding to the *UNE Remand* and *Line Sharing* proceedings – the *Triennial Review* – remains appealable. Both the *UNE Remand* and *Line Sharing* Orders were appealed to the D.C. Circuit, and that court remanded both decisions to the FCC in its first *USTA* decision.[5] The FCC then consolidated these remands into the *Triennial Review*.[6] Later, the appeals of the *TRO* were transferred to the same panel at the D.C. Circuit because the order arose from the same proceeding.[7] Thus, as long as the *Triennial Review* proceeding remains pending before the FCC, neither the *UNE Remand* nor the *Line Sharing* proceeding has been terminated by a final, non-appealable order.

In other proceedings, Verizon has argued that its merger obligations expired in July 2003. However, the Merger Conditions' three-year "sunset" provision explicitly did not apply to conditions whose duration was otherwise specified.[8] The obligation to provide UNEs pending the final resolution of the litigation over Section 251(c)(3) obligations was precisely such a condition whose duration was specified by the Conditions. The specific termination date for the UNE merger condition is "the date" on which "the Commission's orders in those proceedings,

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[4] *Bell Atlantic/GTE Merger Order*, ¶ 316 (emphasis added).

[5] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

[6] The *TRO* is expressly captioned as an "Order on Remand" in both the *UNE Remand* docket (CC Docket No. 96-98) and the *Line Sharing* docket (CC Docket No. 98-147).

[7] *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682 (8th Cir. 2003); *USTA II*, slip op. at 10-11.

[8] The FCC explicitly stated that, "[e]xcept where other termination dates are specifically established herein, all Conditions set out in th[e] [Order] ... shall cease to be effective and shall no longer bind Bell Atlantic/GTE in any respect 36 months after the merger closing date." *Bell Atlantic/GTE Merger Order*, Appendix D, ¶ 64 (emphasis added).

and any subsequent proceedings, become final and non-appealable."[9] This obligation could have ended months or years earlier, or later, than the sunset date. Since the purpose of the condition was to ensure stability until the litigation over Section 251(c)(3) was resolved, it would have made no sense for the FCC to have intended the merger condition to expire even while the litigation remained pending. Fortunately, the Department need not speculate on the proper interpretation of the sunset provision, because the FCC has already held that the UNE merger condition is one of the conditions that is not covered by the three-year sunset.[10] Therefore, the UNE merger condition clearly remains in effect.

Finally, Verizon has argued elsewhere that only the FCC can enforce its merger obligations. However, the Merger Conditions themselves contemplate state recognition and application of the Guidelines. *See Bell Atlantic/GTE Merger Order,* Appendix D, ¶ 63 (providing that "Bell Atlantic/GTE shall not be excused from its obligations under these federal Conditions on the basis that a state commission lacks jurisdiction under state law to perform an act specified or required by these Conditions...."). The Petitioners have not yet sought enforcement of the condition by the FCC because Verizon has not yet violated them. However, pursuant to paragraph 63 of the conditions, state commissions should apply the requirements of the Merger Conditions when formulating their guidance to carriers as to impact of *USTA II.*

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[9] *Bell Atlantic/GTE Merger Order*, ¶ 316.

[10] In interpreting the SBC-Ameritech merger conditions, which imposed a substantive identical UNE provision, the FCC explicitly included this UNE condition in a list of conditions that were not subject to the three-year sunset date because they specified their own, different terms for expiration. *See Applications of Ameritech Corp.*, Memorandum Opinion and Order, DA 02-2564, ¶ 3 & n.7 (Oct. 8, 2002).

II. THE DEPARTMENT IS AUTHORIZED TO REQUIRE CONTINUED UNBUNDLING UNDER SECTIONS 251 AND 252 OF THE ACT.

Even if the *Merger Conditions* did not exist, Verizon would remain obligated to provide UNE switching and transport under Section 251 of the Act. *USTA II* did not invalidate Verizon's *statutory* obligations or its contract obligations. While the FCC's implementing regulations would be vacated, the Department has a direct obligation under Section 252 of the Act to ensure that interconnection agreements continue to "meet the requirements of Section 251, *including* the regulations prescribed by the [FCC] pursuant to Section 251."[11] The Act explicitly permits State commissions to arbitrate all "open issues," 47 U.S.C. §252(c), which necessarily includes issues that are open because the FCC has not issued regulations that resolve them. Thus, the Department is not limited to implementation of FCC rules; instead, the FCC's regulations (if any) are only one of the criteria that must be satisfied in a state commission's overall analysis of whether an agreement meets the requirements of Section 251.

Section 252(e)(3) of the Act expressly preserves the authority of state commissions to enforce their own requirements with respect to access to, and interconnection with, incumbent local exchange company facilities. Given the Department's independent obligation and authority to implement Section 251, any validation of Verizon's wishful assault on its unbundling obligations on June 15 would be in error and, by any measure, certainly would be premature. Even though *USTA II* would, if it ever takes effect, vacate the FCC's rules pertaining to unbundled transport and switching, there can be no serious dispute that CLECs would be impaired in at least certain instances without unbundled access to such facilities, as demonstrated below. Because Congress

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[11] 47 U.S.C. § 252(c)(1) (emphasis added).

made impairment the "touchstone" of the UNE provisions of the Act,[12] any action by the Department that would jeopardize competitive access to these facilities in the interim period before, as is likely, unbundling obligations for them are restored by the Supreme Court on appeal or by the FCC on remand, would undermine Congress' core purposes of the Act by dooming competitors to impairment.

A. CLECs are Undeniably Impaired without UNE Transport for the Majority of Routes.

The record of the *Triennial Review* proceeding and preceding cases clearly establish impairment for transport at the majority of locations for DS1 transport,[13] DS3 transport,[14] and dark fiber transport.[15] These findings were made despite the fact that ILECs were afforded months to present contrary evidence to the FCC – a telling indication that in many cases there is simply no credible evidence that CLECs are not impaired without access. For example, in noting that the record indicates that competing carriers generally cannot self-provide DS1 transport,[16] the FCC observed that "[e]ven some incumbent LECs concede that some impairment exists at the DS1 level according to the impairment tests they propose."[17] The FCC concluded that national impairment exists today for DS1 transport, and applied these facilities to its "trigger" guidelines for the state commissions because it predicted that technology might, *in the future*, enable the

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[12] *USTA I*, 290 F.3d 415, 425 (D.C. Cir. 2002).

[13] *See generally Triennial Review Order* at ¶ 360 ("competitive facilities are not available in a majority of locations"); *see also id.* at ¶ 391.

[14] *See Triennial Review Order* at ¶ 387.

[15] *See Triennial Review Order* at ¶ 384.

[16] *See Triennial Review Order* at ¶ 391.

[17] *Triennial Review Order* at fn. 1215.

emergence of competitive alternatives.[18] As for the present, CLECs are unquestionably impaired without access to many unbundled transport routes. Even Verizon's own filing to the Department in DTE No. 03-60 sought non-impairment determinations for only a limited number of transport routes. It is clear that, under any permissible interpretation, CLECs would be impaired without access to a considerable number of Verizon's transport routes.

Thus, there are transport facilities that must be classified as UNEs pursuant to Section 251 but that would not be covered by any effective FCC regulation if the Court's *vacatur* takes effect. In that event, the Department remains authorized under Section 252 to make its own unbundling decisions in order to effectuate Section 251 or state law or policy.[19] It is not rendered powerless to act simply because the FCC regulations may take yet another court-ordered holiday from the books.

Verizon has suggested that special access pricing should replace UNEs if the transport UNE rules are vacated. However, even if this change were not unlawful, it would be bad policy. Verizon's special access rates are too high to support local competition, especially in the mass market. And Verizon does not even offer dark fiber as special access at any price. Special access services were available prior to the 1996 Act and are priced on a monopoly, not a market, basis – their availability did not support local competition then, and they would not do so now. The consumers of Massachusetts have no interest that would be served by a return to that era. Therefore, the Department should not permit Verizon to shift UNE transport facilities to special access pricing simply as a result of a temporary absence of an FCC transport rule.

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[18] *Triennial Review Order* at ¶ 392 (finding that competitive DS1 transport is generally not available even from competing fiber transport providers, but applying DS1 to trigger rules to adapt rules to future changes in technology).

[19] *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3).

B. No New Impairment Findings Are Needed for Dark Fiber and High-Capacity Loops.

Any arbitration to implement *USTA II* would not be called upon to evaluate impairment for dark fiber loops or high-capacity loops because the rules for these UNEs were not vacated by the D.C. Circuit.[20]

C. CLECs Remain Impaired Nationwide Without Unbundled Local Switching.

It is clear that CLECs would often be impaired in seeking to serve the mass market without unbundled local switching. The *Triennial Review Order* determined such impairment existed on a national basis, based in significant part upon the operational barriers to facilities-based CLEC deployments posed by failures in existing ILEC hot cut procedures.[21] The FCC found that continued access to UNE-P was necessary because the "operational and economic barriers arising from the hot cut process create an insurmountable disadvantage to carriers seeking to service the mass market."[22] In light of such impairment, regulators would fail their obligation under the Act if they sank the UNE-P ship before the lifeboat of effective hot cut procedures arrives and is proven seaworthy. If UNE-P were eliminated, CLECs who now use UNE-P should have a fair and reasonable opportunity to move their existing customers to an alternative switch. The absence of a viable batch hot cut process means that this alternative is not available today. In addition, the FCC found that CLECs would remain impaired without unbundled switching in many markets due to other operational factors, such as the availability of collocation, and ILEC

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[20] *See USTA II* at 594. ("To summarize: We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme established for mass market switching and *certain dedicated transport elements* (DS1, DS3, and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to *these elements*.") (emphasis added).

[21] *Triennial Review Order* at ¶¶ 459, 464-475.

[22] *Triennial Review Order* at ¶ 475.

provisioning of CLEC-to-CLEC cross-connects.[23] The FCC also was "persuaded that other economic factors ... may make entry uneconomic without access to the incumbent's switch," especially in "high-cost, low revenue locations" such as central offices that serve fewer than 25,000 lines.[24] Thus, impairment now exists everywhere in Massachusetts today because of the inadequacies of the hot cut process, and impairment will still exist in many locations in Massachusetts even if the problems with the hot cut process are resolved. In view of this impairment, the only way to effectuate the Congressional intent of Section 251 at this time is for the Department to continue to require Verizon to offer unbundled local switching on existing rates and terms until a lawful determination is made that CLECs are not impaired without such access.

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[23] *Triennial Review Order* at ¶¶ 476-478.

[24] *See Triennial Review Order* at ¶ 484. The FCC deferred to the state commissions to make impairment findings based upon the size of a wire center; however, it observed that "Even the studies by the incumbent LECs, SBC and BellSouth, found that entry would be uneconomic for wire centers of under 5,000 lines." *Id.*

CERTIFICATE OF SERVICE

I, Paul B. Hudson, hereby certify that on this 27th day of May, 2004, served the foregoing document on the following individuals via overnight delivery and electronic mail:

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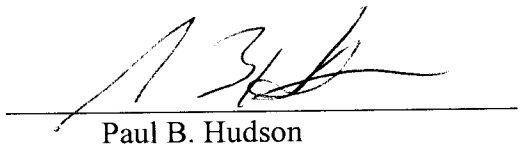

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